THE HONOURABLE SRI JUSTICE

B.SESHASAYANA REDDY

WRIT PETITION NO.11861 OF 2005

DISPOSED OF ON 20-09-2005

BETWEEN:

M/S.SRI PRAVEEN ENTERPRISES, HYDERABAD…PETITIONER

AND

THE UNION OF INDIA AND OTHERS……RESPONDENTS

THE HONOURABLE SRI JUSTICE

B.SESHASAYANA REDDY

WRIT PETITION NO.11861 OF 2005

O R D E R :

1. This Writ Petition is filed by M/s.Sri Praveen Enterprises, a partnership firm, represented by its Managing Partner R.Ranga Reddy assailing the action of General Officer Commanding in Chief, HQ, Southern Command, Pune (MAH)-3rd respondent in not publishing re-tender No.303042/Apr 2005/ST5, dated 9.5.2005 in the regional newspapers published from Secunderabad/Hyderabad (AP) and Bangalore (Kar) two weeks in advance of the proposed date of opening (25.5.2005) and also not sending the individual call notice of the subject tender to the petitioner firm to reach to it two weeks in advance as being in violation of Procedure for Conclusion of ASC Contracts for perishable items vide 1st respondent's Policy Letter No.PC/ RAKSHA/68063/Q/ST5/5089/D (QS) dated 22.11.2000.

2. The case of the writ petitioner in brief is as follows:

The petitioner firm is a registered Class 'B' ASC contractor duly registered with the HQ Southern Command, Pune with a contract carrying capacity of Rs.2.08 Crores and thus entitled as of right to participate in the tenders/bidding for the supply of perishable items (including food items) that are called for by and on behalf of 3rd respondent in areas which includes military stations like Secunderabad (AP) and Bangalore (Kar) etc. 3rd respondent called for tenders in the month of December, 2004 for supply of Fowls dressed to troops in Secunderabad and Bangalore Stations for the financial year 2005-06 i.e. 1.4.2005 to 31.3.2006. In response to the above tenders, bids were received from several bidders which were found to be on higher side and therefore 1st respondent decided to go in for re-tender. 3rd respondent issued re-tender on 9.5.2005 vide Tender Notice No.303042/Apr 2005/ST-5 fixing 25.5.2005 as the date of opening tenders. 3rd respondent authority did not give wide publicity to this re-tender notification by publishing the same in the regional newspapers published from either Secunderabad (A.P) or Bangalore (Karnataka) as was required under para 42(b) of Procedure for Conclusion of ASC Contracts for perishable items vide Lr.No.PC/ RAKSHA/ 68063/q/ST-5/5089/D (QS), dated

22.11.2000. 3rd respondent authority also did not dispatch the copy of the said re-tender notification by post to the petitioner firm well in advance so as to reach the petitioner firm atleast two weeks in advance of the date of proposed opening of the tender notice. The said re-tender notification reached the petitioner's office on 25.5.2005 i.e. the date of opening of the tender. The petitioner-firm immediately sent a letter to 3rd respondent detailing all the facts and circumstances, but no response was received from 3rd respondent. Hence, this writ petition.

3. The petitioner also moved WPMP.No.15112 of 2005. While issuing Rule Nisi interim direction came to be passed on 8.6.2005. The petitioner also filed WPMP.No.15113 of 2005 with a prayer to direct the respondents to permit the petitioner-firm to participate in the local purchase of fowls (dressed) at Trimulgherry and Bangalore supply depots. The following order came to be passed in the said petition on 11.7.2005:

" The petitioner claims to be a registered partnership firm constituted by an ex-serviceman. It is registered with the Head quarters of Southern command, Pune as an approved Army Service Corps contractor and as such accredited to enter into regular or local supply contractor. The respondents re-tendered for a contract for supply of fowls(dressed) for the period 1-6-2005 to 31.3.2006 for supply to the troops of the head quarters, southern command. According to the relevant guidelines governing the award of contracts in this area, the petitioner as a registered contractor is entitled to an intimation as to the tendering. While the petitioner claims to have received such intimation on 25.5.2005, the date scheduled for opening of the tenders, the respondents assert that the call notice was dispatched to the petitioner on 13.5.2005. Whether dispatch of the notice reasonably anterior to the date of opening of the tenders would constitute a substantial compliance with the requirements of the guidelines, is a question that has been gone, at the hearing of the writ petition. This court by the interim order dated 8.6.2005 in W.P.15112 of 2005 directed the respondents to permit the petitioner also to submit its application in respect of the contract and in response to the tender notice dated 9.5.2005 and consider it on merits.

The respondents assert that the tenders were opened on 25.5.2005 and permitting the petitioner to submit his bid pursuant to the interim order dated 8.6.2005 would subvert the transparency of the tender process, as the petitioner is likely to be aware of the bids of the other tenderers, it is therefore likely to gain

advantage by quoting the lowest rates. The respondents have also filed WVMP.No.1678 of 2005 seeking vacation of the interim order dated 8.6.2005.

In the aforesaid circumstances, as supply of fowls(dressed) for the troops ought not to be interdicted in the public interest and as individual grievance must give way to larger public interest and also since the exact nature of the obligation of the respondents in the matter of communication of the call notice to the registered contractors requires to be determined at the hearing of the writ petition, it is hereby directed the respondents shall be at liberty to process the tenders received and award the contract but subject to the result of the writ petition."

4. The successful tenderer filed W.P.M.P.No.24286 of 2005 to come on record as party respondent in the writ petition. The said petition came to be allowed on 6.9.2005.

5. The counter affidavit of the respondents 1 to 9 in brief is :

The procedure for conclusion of ASC contracts for perishable items (including Fowl dressed) is governed by the procedure laid down vide GOI, MID letter No.PC/RAKSHA/ 68063/Q/ST-5/5089/D(QS), dated 22.11.2000. As per para 42 of the said letter, the advertisement of conclusion of contract to be published in the newspapers as following:

a. **For initial tendering**. To be published four weeks in advance in two national and two regional newspapers.

b. **For subsequent re-tendering**. To be published two weeks in advance in one national and one regional newspapers.

The entire procedure as listed in GOI, MID letter mentioned above was followed in letter and spirit. No violation of the said procedure has taken place as brought out by the petitioner. Six call notices inviting tenders for conclusion of contract for meat group items have been sent to the petitioner. No response whatsoever has been received from the petitioner, which clearly indicates the

lack of interest of the petitioner to participate in tendering activity for meat group items. The petitioner has been visiting the office of the 4th respondent and other supply depots but he has never shown any interest or made any enquiry regarding the conclusion of contract of meat group items. Till date 41 calls have been made inviting tenders for all ASC items in the entire Southern Command Zone at various Headquarters i.e. Southern Command, 21 Corps, ATNK & K Area, MG & G area, 61(I) Sub Area, Bhopal Sub Area, Mumbai Sub Area, Pune Sub Area. Out of 41 calls, the petitioner as per his contract carrying capacity was eligible to participate in 29 numbers of tendering activities. In spite of having no business in the financial year 2005-06, as stated by the petitioner, he participated in only 02 tendering activity. Besides advertisement in the newspapers, individual call notices No.303042/Apr 2005/ST5, dated 9.5.2005 were also sent to all registered contractors/firms to ensure wide publicity and healthy competition. The copy of said call notice was also sent to various headquarters and supply depots for due publicity within the precincts of their establishments as per system in vogue. In response to call notice dated 9.5.2005, 9 firms from Danapur (Patna), Varanasi, Alwar, Jhansi, Coonoor (TN), Pune and Ahmednagar have submitted tenders. All the registered ASC contractors including the petitioner were sent a copy of the said re-tender Notification dated 9.5.2005 well in advance. The call notices were dispatched under certificate of posting/OIGS and in response to the said call notice, 15 applications for issue of tenders were received from different parts of the country. The petitioner has not produced any proof to substantiate its claim that the call letter was received by it only on 25-5-2005.

6. In the counter affidavit of 10th respondent it is stated that 10th respondent along with six others have participated in the tender and 10th respondent became the lowest tenderer and the work has been awarded in its favour on 30.7.2005 and he has started execution of the contracts. I deem it appropriate to refer para 3 of the counter and it is thus:

" 3. Before adverting to the various allegations made in the affidavit filed in support of the writ petition, it is respectfully submitted that the initial tender notification was issued in the month of November/December 2004 inviting tenders from intending

contractors in respect of various items. In the tender notification, the various items have been mentioned, I understand that the writ petitioner has also participated in the initial tender and has clearly mentioned in the tender application that he is not offering his tender for meat items and not interested in meat group items and he is participating only in respect of vegetable items. I submit that the tenders were not finalized and thereafter the tenders were called for more than six occasions and at no point of time, the writ petitioner has participated in the tender. I submit that the petitioner having not participated in the tender at any point has no locus standi to question the tender notice issued by the respondent on the technical ground. It is submitted that all the registered contractors were issued notices of the proposed tender and this respondent having its office in Varanasi have received the tender notice well in advance and have participated. Apart from this respondent, others from various states like Tamil Nadu, Bihar, Maharashtra etc., have also participated in the tender. It is submitted that even if there is any infraction on the part of the respondents with regard to the alleged plea of non publication of the tender notice in the newspaper, the same would not invalidate the entire tender process. It is submitted that the guidelines that have been framed by the 1st respondent are only for guidance to the lower authorities and any infraction of the guidelines would not invalidate the tender unless it is shown that it has caused prejudice to the public at large. It is submitted that on a reading of the affidavit filed in support of the writ petition, it is clear that except stating that he has received the tender notice on 25.5.2005, no evidence has been adduced nor the petitioner has averred in the writ petition that he has experience of supplying fowls dressed to the army. In fact for a period of four months i.e. from 1.4.2005 to 4.8.2005, the authorities have purchased fowls DSD from local people. I submit that the petitioner has not participated in the same nor has submitted his quotation. I submit that from the date of registration of the petitioner firm, he has not participated even once in the tenders for supply of meat items. I submit that in absence of the same, the writ petitioner has no locus standi to question the action of the respondent. I submit that the present writ petition has been filed for extraneous consideration and not a bonafide one."

7. Heard Smt.Chaya Devi, learned counsel appearing for the petitioner, learned Additional Solicitor General appearing for the respondents 1 to 9 and Sri.O.Manohar Reddy, learned counsel appearing for the 10th respondent.

8. It is not in dispute that the petitioner and 10th respondent are registered contractors with 3rd respondent. 3rd respondent issued initial tender notice for the supply of various perishable items including fowls (dressed alive) on 14.12.2004. As per the procedure prescribed for conclusion of ASC contracts, advertisement has to be published four weeks in advance before the date of initial tendering through Director of Advertisement and visual Publicity, Ministry of Information and Broadcasting 9DAVP); and for subsequent re-tender, the advertisement has to be published two weeks in advance in one regional and one national newspaper only. It is also not in dispute that the petitioner earlier participated in tenders for some perishable items and he is well aware of the procedure for conclusion of ASC contracts (perishable items). Admittedly, contracts for meat etc., for the period from 1-4-2005 to 31-3-2006 were not finalized in pursuance of the initial call. Therefore, re-tenders were issued repeatedly. So far as fowls (dressed) is concerned, re-tender was issued on 9.5.2005. It is the grievance of the writ petitioner that copy of the re-tender was not communicated to him two weeks in advance and that publication was also not effected in one national and one regional newspaper two weeks in advance.

9. Learned counsel appearing for the petitioner referring to the procedure for conclusion of ASC contracts for perishable items submits that non-publication of re-tender in two weeks in advance in one national and one regional newspaper and non communication of the tender notice to the petitioner-firm who is a registered contractor vitiate the entire process of re-tender and thus award of the contract to 10th respondent is required to be declared as null and void. She made copious references to the clauses in the letter dated 22.11.2000 whereunder the sanction of the President to the adoption of revised procedure for conclusion of ASC contracts for perishable items has been given. The letter contains the procedure for ASC contracts for perishable items. Para 42(b) of Letter dated 22.11.2000 reads as under:

" 42(b) The advertisement will be published 4 weeks in advance before the date of initial tendering through Director of advertisement and Visual Publicity, Ministry of Information

> and Broadcasting (DAVP). For subsequent re-tender, the advertisement will be published 2 weeks in advance in one regional and one National Newspaper only, under their own arrangement and need not be routed through DAVP."

A feeble argument has been made with regard to the composition of panel of Officers who screened the tenders. rRference has been made to para 68 of the Procedure for Conclusion of ASC Contracts for perishable items. To buttress her submissions, reliance has been placed on the decisions of Supreme Court in RAMANA V. I.A.AUTHORITY OF INDIA, TATA CELLULAR V. UNION OF INDIA and LIC OF INDIA V. CONSUMER EDUCATION & RESEARCH CENTRE. In the 1st cited decision, the tender notice stated in clear terms that sealed tenders in the prescribed form are invited from registered IInd class hoteliers having at least 5 years experience for putting up and running a IInd class Restaurant and two Snack bars at the Airport for a period of 3 years. In the above circumstances, it was held that on a proper construction what the notice required was that only a person running a registered II nd Class hotel or restaurant and having at least 5 years experience as such should be eligible to submit a tender. This was a condition of eligibility and it is difficult to see how this condition could be said to be satisfied by any person who did not have five years experience of running a II nd class hotel or restaurant. Coming to the facts of the case on hand, the petitioner has not questioned the eligibility of the successful tenderer i.e. 10th respondent, therefore the cited decision has no application to the facts of the case on hand. In the second cited decision, the Supreme Court held that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tenderer is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral

purpose the exercise of that power will be struck down. It is further held that judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself. It is thus different from an appeal. When hearing an appeal, the Court is concerned with the merits of the decision under appeal. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision. The duty of the court is thus to confine itself to the question of legality. Its concerned should be:

1. Whether a decision making authority exceeded its powers?
2. Committed an error of law,
3. Committed a breach of the rules of natural justice,
4. Reached a decision which no reasonable tribunal would have reached or,
5. Abused its powers.

There cannot be any dispute with regard to the proposition of law laid down in the above referred decision with regard to the scope of judicial review in contractual powers to be exercised by the Government bodies. In the third cited decision, the Supreme Court held that action of public authority having public elements must be in public interest and should not be arbitrary, unjust or unfair.

10. Per contra, learned Additional Solicitor General appearing for respondents 1 to 9 submits that initial tender was issued for perishable items fowls (dressed) and since the amounts quoted in the initial tender for various items were on high side, the authorities decided to go for re-tender. So far as fowls (dressed) is concerned re-tender was issued on 9.5.2005 and copy of tender notice was dispatched to all the registered contractors including the writ petitioner and therefore it amounts to substantial compliance of the procedure prescribed under ASC Contracts for Perishable items. He further submits that the petitioner has not placed any material on record to show that copy of the tender notice sent to him it reached on 25.5.2005 and not earlier and therefore the petitioner is not entitled to question the award of contract in favour of 10th respondent in pursuance of the tender notice dated 9.5.2005. It is also submitted by him that the provisions of ASC contracts are in the nature of

instructions and they are not the statutory rules and therefore any infraction of the provisions in the procedure for conclusion of ASC contracts does not entitle the petitioner to approach this court by invoking jurisdiction under Art.226 of the Constitution of India. To buttress his submissions, reliance has been placed on the decisions of Supreme Court in G.J.FERNANDEZ V. STATE OF MYSORE, MASTER MARINE SERVICES (P) LTD. V. METCALFE & HODGKINSON (p) LTD., J.R.RAGHUPATHY V. STATE OF A.P. and UNION OF INDIA AND OTHERS V. S.M.HUSSAIN RASHEED. In the 4th cited decision, the Supreme Court held that the State can give administrative instructions to its servants how to act in certain circumstances, but that will not make such instructions statutory rules which are justiciable in certain circumstances, in order that such executive instructions have the force of statutory rules it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the Constitution providing therefore. In the 5th cited decision, the Supreme Court held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, should the court interfere. In the 6th cited decision, the Supreme Court held that the High Court in exercise of the jursdiction under Article 226 of the Constitution cannot sit in appeal over the decision of the State Government to locate the Mandal Headquarters at a particular place. It is further held that the writ in the nature of mandamus cannot be issued to enforce purely administrative instructions. In the 7th cited decision, a Division Bench of this court in para 17 held as follows:

> " 17. It is a very well settled position in law that a petition challenging an action of the authority as arbitrary or unreasonable, must indicate how and in what manner it is arbitrary and unreasonable. Vague and general allegations are not sufficient. As per settled law, the party who invokes the

> extraordinary jurisdiction of the Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation and one cannot be permitted to pick and choose the facts he likes to disclose and to suppress or not to disclose other facts. The very basis of the writ jurisdiction of this Court rests on disclosure of true and complete facts. It is equally well settled that a petitioner who does not come with candid facts and clean hands cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is most reprehensible. In a writ proceeding, if the petitioner does not disclose all the material facts fairly and truly but states them in a distorted manner with a view to mislead or deceive the Court, the Court is bound to protect itself and to prevent an abuse of its process. Jugglery has no place in equitable and prerogative jurisdiction.'

11. The principle of judicial review would apply to exercise the contractual powers by the Government bodies in order to prevent arbitrariness or favouritism. The plea put forth by the petitioner is two folded. Firstly, publication of re-tender was not given effect to in any regional newspapers i.e. either in Bangalore or Secunderabad, secondly individual communication sent to it reached on the date of tender itself and thus disabled the petitioner to participate in the tender. It is no more in dispute that initial tender was called for and as the amounts quoted by several bidders were on higher side, the authorities did not accept any of the tenders and decided to go in for re-tendering. The procedure for conclusion of ASC contracts for perishable items has been prescribed. It is not brought to my notice that the procedure has been prescribed in pursuance of any statutory Rules. In the absence of any statutory provision enabling the Government to issue guidelines the Procedure for conclusion of ASC contracts for perishable items can at best be treated as executive instructions. It is well settled that even in order that such executive instructions have the force of statutory rules, it must be shown that they are issued either on the authority conferred on the Government by some statute or under some provision of the Constitution providing thereon. It is not the case of the petitioner that the authorities have shown undue favour to 10th respondent in awarding the contract in respect of fowls (dressed). The principal ground on

which he challenges the notification of re-tender in respect of fowls (dressed) is that the petitioner being a registered contractor received individual communication, on the date of tender itself and thereby he disabled to participate in the tender. This is a factual aspect which the petitioner is required to plead and place material to substantiate it. The petitioner has not placed any evidence on record to show that the individual communication reached him on 25.5.2005. Instead the respondents have placed on record enough material (Photostat copy of the dispatch register) to show that individual communications to the registered contractors (about 123) were sent well in advance. The individual communication was sent not only to the writ petitioner but also to various other contractors. No complaint from any other person that they did not receive the individual communication well in advance. Indeed 15 persons submitted their tenders in pursuance of the individual communications. It is nowhere stated in the writ affidavit that he received the individual communication on the date of opening of the tender itself. What is stated in the writ affidavit is that the authorities did not send individual call notices to several registered contractors including the petitioner so as to reach the same two weeks in advance. I deem it appropriate to refer the relevant portion in the writ affidavit and it is thus:

" 14. It is submitted that the Writ Petitioner firm has come before this Honourable Court with a prayer that in the circumstances narrated herein below in this affidavit, the Honourable Court may be pleased to call for the records from the respondents herein pertaining to the issues raised by the petitioner herein in this writ petition and issue a direction, order or writ more appropriately one in the nature of a Writ of Mandamus and declare the action of the 3rd respondent herein in not publishing their Tender No.303042/Apr 2005/ST5 dated 9.5.2005 in the regional newspapers published from Secunderabad/Hyderabad(AP) and Bangalore (kar) two weeks in advance of the proposed date of opening (25.5.2005) and also not sending the individual call notice of the subject tender to the petitioner firm to reach to it two weeks in advance as being in violation of Rule 42(b) and rule 51 of 1st respondent's policy letter No.PC/RAKSHA/68063/Q/ST5/5089/D(QS) dated 22.11.2000 as also violation of petitioner's Fundamental Rights guaranteed under Article 14 & 16 of the Constitution of India and therefore ULTRA VIRES."

It is explicit from the above referred portion of the writ affidavit that the writ petitioner did not plead of receiving individual intimation on the date of opening of the tender and thereby it disabled to participate in the tender. Ofcourse in the

reply affidavit, the petitioner tries to make its plea specific by denying the averments in para 5 of the counter affidavit. The petitioner has not placed any record to show that it received the individual communication from the 3rd respondent on 25.5.2005 and thereby it disabled to participate in the tender. When once the petitioner fails to prove this fact, it is not entitled to invoke the extraordinary jurisdiction of this court under Article 226 of the Constitution of India.

12. Accordingly, this writ petition is devoid of merits and the same is dismissed. No costs.

Tnb

Dated:20-09-2005. (B.Seshasayana Reddy,J)

THE HONOURABLE SRI JUSTICE

B.SESHASAYANA REDDY

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